systems were benefiting in the apportionment of the "federal aid to wildlife-restoration fund" at the expense of those States with simple licensing structures; and by 1957 the problem became a matter of concern to the International Association of Game, Fish and Conservation Commissioners (R. 59–82). Not until late 1958, however, was the matter brought to the attention of the Secretary of the Interior or the Assistant Secretary having jurisdiction over fish and wildlife (R. 29, 119–125).

At the request of the Assistant Secretary for Fish and Wildlife of the Department of the Interior, the Solicitor of the Department issued a summary opinion in March 1959, in which he stated that the term "paid hunting-license holders" should be construed as referring to individuals holding one or more licenses and not to the number of licenses held (R. 128). The Assistant Secretary then wrote to the fish and game departments of all the States quoting the Solicitor's opinion and suggesting a form of certification for "paid hunting-license holders" (R. 146–147). In June 1959 the Solicitor issued a formal memorandum opinion (R. 129–140), in which he reviewed in detail the administrative interpretation of the Act, and concluded that "in apportioning Federal funds for wildlife restoration purposes under section 4 of the Act the Secretary of the Interior should include as 'license holders of each State' all individuals to whom a State has issued one or more licenses; he should not include all licenses issued by a State when, under State law, more than one license may be issued to a single individual" (R. 136).

Forty-six States submitted certifications in the prescribed form which were accepted by the Department. Petitioners submitted certifications which showed on their faces that the number of "paid hunting-license holders" certified was actually the total number of hunting licenses sold rather than the number of individuals to whom one or more licenses had been sold (R. 151–155, 248).

In November 1959, the Secretary apportioned the fund among the several States. Since petitioners had not submitted acceptable certifications, only partial apportionments were made for them. This was done by eliminating the categories of licenses which probably involved duplications of individuals. The sums withheld were placed in reserve to afford petitioners an opportunity to submit revised certifications conforming to the guidelines theretofore laid down (R. 156–158).

2. *Proceedings below.* Petitioners' actions in the district court sought (1) a declaration that "license holders" means total licenses issued, and (2) an order directing the Secretary to make apportionment of the fund on that basis. On an extensive record made on affidavits and exhibits, petitioners moved for summary judgment. The Secretary moved to dismiss, or, in the alternative, for summary judgment. The district

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[1] Under the scheme of the Act no payment of apportioned moneys is made until a full and detailed statement of the state's project and the plans, specifications and estimates have been submitted to and approved by the Secretary, all of which occurs after the initial apportionment. 16 U.S.C. § 669e. And actual payment normally follows completion of the project. *Id.*, § 669f.

court agreed with petitioners' interpretation of the statutory apportionment formula (Pet. 5a) and entered an order granting petitioners' motions and requiring the Secretary to apportion the funds on the basis of the court's construction of the statute (R. 327–328).

The Court of Appeals reversed (one judge dissenting). It held, *inter alia*, that, on the basis of the plain and unambiguous statutory language, "the term 'hunting-license *holders*' refers to *persons*, not permits", that is, "the number of *different individuals* holding licenses that must be counted, rather than the total number of licenses issued"; that the legislative history proved nothing to the contrary; and that such interpretation accorded with the administrative construction given the statute from the beginning (Pet. 13a–16a).[4]

ARGUMENT

This case turns upon the interpretation of a statute governing action by the Secretary of the Interior, to be made in light of the language of the Act and the facts of record showing the administrative construction. There is no conflict among the circuits, and the decision of the court below is correct. No need exists for further review by this Court.

Essentially, petitioners' position is two-fold: first, that the lower court's interpretation of the apportion-

[4] Noting that in practice the fund was apportioned for some 20 years on the basis of the total number of licenses issued by each State, with elimination only of multiple licenses obviously issued to the same person, the court said: "But it is plain they always knew that the law required the elimination of *all* duplications" (Pet. 16a).

ment formula will have a serious and inequitable impact on State restoration programs, and second, that the interpretation is at variance with the legislative intent and the administrative construction during the major part of the life of the Act. Neither of these contentions has merit.

1. The construction of the statute adopted by the court below does not raise any problem of general importance involving the relationship of the federal government to the States. As the opinion points out, the Secretary is, in a significant sense, "disinterested", for, in principle, "the whole fund is distributed among the several states," after deduction of administrative expenses, and the "real argument, then, is between those states with fragmented licensing systems and those with relatively simple license structures" (Pet. 16a, fn. 23).

In other words, the challenged opinion, in limiting certifications to "holders", i.e., persons, rather than including all licenses, can have an adverse effect, if any, only upon those States which have "fragmented" their licensing structures to the point where, in certifying all licenses, they can obtain a disproportionate share of the "federal aid to wildlife-restoration fund" at the expense of those States with simpler licensing systems.[5] This was the gist of the certification prob-

[5] In this connection the court below noted: "There is, of course, nothing inherently more reasonable about apportioning on the basis of total licenses rather than license holders. On the contrary, appellees' interpretation would encourage a system of particularized licenses for each type of game in what the Secretary rightly labels 'an unseemly grab for federal funds,' which Congress cannot be assumed to have intended." (Pet. 16a, fn. 24).

lem as it was considered in 1957 by the International Association of Game, Fish and Conservation Commissioners, which stated that a State with a multiple licensing structure is "not taking advantage of federal aid, [it] is taking advantage of [its] sister states" (R. 75). And this organization endorsed the Secretary's apportionment policy in 1959, after the Secretary's action had made clear that certifications must be on the basis of "holders" rather than licenses (R. 145).

Consequently, contrary to petitioners' assertion that the decision, if allowed to stand, "will have a serious impact on important wildlife restoration programs of the states" (Pet. 6), we submit that the Secretary's approach avoids unfairness. The "equitable distribution of this revenue to [all] the states", in order to assist the States in restoring the environment of wildlife and its preservation, was the specific objective of the Congress. H. Rep. No. 1572, 75th Cong., 1st Sess., p. 2. Considering this aspect of the matter as a convincing argument against the interpretation which petitioners now seek, the Solicitor of the Department of Interior in his detailed memorandum opinion of June 1959 correctly reasoned that "[a]n apportionment of revenues on the basis of sales of hunting licenses would not, unless uniform in all States, result in an equitable distribution of funds and could, we believe, defeat the purposes of the legislation, since the multiplication of types of licenses could eventually destroy any semblance of a relation-

ship between the need for assistance and a rational apportionment of the revenues" (R. 132).

It follows that the decision below, far from having a generally adverse effect, will foster a more equitable distribution of the fund among the States.

2. Moreover, the lower court was correct in holding that the unambiguous language of the statute calls for certifications of "holders" rather than licenses; that the statutory history proves no contrary Congressional intent; and that the Act was so administratively construed from its inception (Pet. 13a–17a).

The term used by the Congress was "the number of paid hunting-license holders". As the court noted, the phrase must refer to *persons*, and not, as petitioners maintain, to permits, for otherwise the word "holders" is entirely superfluous. Accordingly, it is the court's construction, rather than petitioners, which gives effect to all of the statutory language and construes words in their usual sense. *Flora* v. *United States*, 357 U.S. 63; *Yates* v. *United States*, 354 U.S. 298.

Moreover, the history does not aid petitioners. As the court below pointed out, there is no indication that the few references to apportionment on the basis of "licenses" in the committee hearings and on the floor of the Congress were made advisedly (Pet. 14a). And while the illustrative computation made in the

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[6] While it may be true, as stressed by petitioners, that the function of multiple licenses was to meet resource management problems (Pet. 8), this is no justification for obtaining the greater and inequitable share of the restoration fund which such licensing structures sought.

House of Representatives report[7] was apparently based on total licenses issued, these were 1935 figures furnished the Congress by the Department of Agriculture[8] and there appears to have been no reason, prior to the enactment of the pertinent statute, for the States to maintain figures as to the number of individual hunters rather than the number of licenses sold. Moreover, the licensing structures in 1935 were relatively simple compared with the later multiple-licensing structures, and at the inception of the Act the number of hunters was substantially represented by the number of licenses issued. Notwithstanding petitioners' assertion[9] to the contrary, the record so establishes (R. 28–29, 137, 171–172, 188–189, 261–262), and the court below properly so found (Pet. 14a, fn. 20).

The court also correctly rejected petitioners' contention that the course of administrative interpretation was contrary to the construction adopted by the court. The Federal Aid Manual issued in 1938 expressly stated that "the law requires the number of license holders and not the number of individual licenses" (R. 47). Successive revisions from 1940 through 1957 contained the same language. And the Solicitor of the Department of Interior properly noted and relied upon this consistent administrative interpretation when he gave his opinion in 1959 (upon which the Secretary acted) that only persons and not licenses should be counted (R. 129–140).

[7] No. 1572, 75th Cong., 1st Sess., p. 3.

[8] *Id.* at pp. 4–5, fn. 1.

[9] It is noteworthy that a letter written in 1956 by the then Solicitor of the Department in response to an inquiry from the Attorney General of Idaho reflected this same construction of the statute (R. 43–46).

While it is true that the administrative practice in screening and accepting certifications did not fully accord with the agencies' legal interpretation, the record explains the reason for the faulty practice (R. 28–29), and the court was plainly correct in stating that the administrators "always knew that the law required the elimination of *all* duplications" (Pet. 16a). It follows that petitioners' arguments that the Secretary changed a long-standing administrative interpretation are without substance.[10]

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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JANUARY 1963.

[10] There is an additional and independent reason calling for denial of the petition. As Judge Washington, concurring in the result, noted, "this is not a case for mandamus [and] under the Supreme Court's decision in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), we should order that the complaint be dismissed for lack of jurisdiction" (Pet. 17a). In our view, Judge Washington's opinion on this phase of the case correctly states the applicable law.

U.S. GOVERNMENT PRINTING OFFICE 1963

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 15 1963
JOHN F. DAVIS, CLERK

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STATE OF MICHIGAN, *Petitioner,*

v.

STEWART UDALL, Secretary of the Interior, *Respondent.*

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The facts and arguments set out in the joint petition, including the numerous record citations, are a complete answer to respondent's opposing brief. However, the following additional comments should be made.

I

It is assumed from respondent's silence that he recognizes, as was urged in the joint petition (pp. 10-11), that the method of apportionment he has now created, unlike the method used consistently for over

20 years and sanctioned by the Congress, is wholly unworkable. But the respondent in essence argues that, even if his newly fashioned method is unworkable, it is somehow more equitable than the old method.[1] Even in this regard, however, respondent refutes his own position. The yardstick for fairness, which he endorses, is the existence "of a relationship between the need for assistance and a rational apportionment of the revenues" (Br. 10-11). This is precisely the result achieved under the method which the respondent now seeks to abandon.

Respondent finally recognizes (Br. 11, fn. 6), as petitioners have urged, that multiple license systems have a legitimate and necessary function in meeting the resource management problems of the states. In passing the Pittman-Robertson Act in 1937, the Congress did not intend to disturb the state license systems, which are designed to meet conditions peculiar to each state, and which were then, as now, multiple in nature in the majority of the states.[2] The State of Michigan,

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[1] As the court below held, the Pittman-Robertson Act gives no discretion to the respondent with respect to the formula (Pet. 12a). Consequently, even if a new formula of apportionment were desirable in order to meet what the respondent now views as changed conditions, the Congress is the sole forum for any revisions, and the respondent has no authority to make them.

It is to be noted that the statement of the International Association of Game, Fish and Conservation Commissioners on which the respondent relies has no relevance in explaining a statute enacted some twenty years earlier. The opinions these officers express are their own, and they are in no position to bind the states.

[2] Although the assertion that licensing structures in 1935 were simple is basic to respondent's position, he refrains, with a telling silence, from answering the refutation made in the joint petition (p. 7, fn. 3). The record references he cites for his position (Br. 12) simply do not support it.

for example, has for over 50 years issued separate licenses to hunt big and small game (Pet. 4) in "recognition of the problems in resource management and restoration with respect to each type of game animals affected" and which the Michigan Conservation Department "must try to solve if these [game] species are to continue to abound for the growing army of hunters" (Pet. 8). In these circumstances, a relatively larger apportionment to that state is wholly equitable and rational, because there is the greater "need for assistance" than there is where a state does not have such multiple problems. Accordingly, it is patently fallacious to argue, as does the respondent, that because the apportionment is greater, it is therefore inequitable.

II

Respondent seeks to create the impression that the statute had been consistently construed as he now urges, though he concedes that the administrative practice did not "fully" accord with that construction (Br. 12-13).[3] He attempts to support his position by wrenching out of context the statement in the Federal Aid Manual of 1938 that "the law requires the number of license holders and not the number of individual licenses" (Br. 12). As was pointed out in the joint petition (p. 12, fn. 11), this statement was made *only* to justify the exclusion of a permit ancillary to a general license concerning which there never has been any issue. The manual in plain and clear language

[3] The fact is that the apportionment was always made on the basis of licenses issued. The District Court so found explicitly (Pet. 6a). This was conceded in the District Court by the respondent's counsel in a colloquy with the court which the dissenting judge below quoted (Pet. 21a).

stated that the apportionment "must be based . . . on number of licenses" and directed that "there should be included all licenses defined as hunting licenses by state laws." (Pet. 12, fn. 11). The Department's understanding and interpretation, and restated repeatedly thereafter, are thus unequivocally memorialized.[4]

Moreover, respondent's position is flatly contradicted by a letter written by the administrator of the federal aid to wildlife program. Under date of November 14, 1957, this official answered an inquiry from Virginia's Commission of Game and Inland Fisheries "concerning the steps your Commission would have to follow to expand the license base used for computing apportionments" by declaring:

> "The direct answer to your question would be that your Legislature would merely have to enact legislation to provide that a separate license would be required for the hunting of every different species of game animal (or fish) in the Common-

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[4] In his efforts to create the impression that attempts were made to administer the statute in accordance with his present interpretation, respondent states (Br. 5) that from the beginning the Department "undertook to screen the certifications made by States to prevent, insofar as possible, one individual from being counted as more than one holder". Respondent omits, however, the next statement in the affidavit from which the foregoing was taken, i.e., "This screening eliminated obvious duplications and errors, such as licenses not pertaining to hunting and tags or permits which clearly required the holder to have a basic prerequisite license" (R. 28). In other words, the screening did no more than eliminate permits ancillary to general licenses previously issued, and did not undertake to eliminate separate licenses issued as part of a multiple licensing structure, even where the so-called duplications were obvious on the face of the certification (see Pet. 12), for the very good reason that the Department's construction of the law required these licenses to be counted.

wealth of Virginia. *Each license would be independent of the other, and an individual holding such a single license would constitute a paid hunting license holder.*" (Emphasis supplied; R. 238-239. See also R. 25-26.)[5]

III

Since state license structures, as respondent recognizes, are fashioned in terms of needs and problems of resource management, it is "unseemly" to suggest that the long-established apportionment formula would be used in "an unseemly grab for federal funds" (Br. 9, fn. 5). There is absolutely nothing in the record to warrant the suggestion that state license structures would be modified except to meet resource management requirements. As the Chief Judge below pointed out:

> "The Secretary's suggestion that, under the District Court's ruling, the states might multiply their hunting licenses in order to obtain a larger portion of federal funds imputes venality to them without any real reason for doing so. I am unwilling to believe, without convincing proof, that the legislatures of sovereign states would enlarge

[5] While the administrator referred to resulting duplication, there is no question that the letter expressed the official view that the statute and administrative practice required the counting of licenses issued, not individuals. Any suggestion of duplication which might result from the settled interpretation and application of this statute does not point to the conclusion that either the interpretation or the application is therefore in error. As pointed out (fn. 1, *supra*), the Congress specifically withheld from the Secretary the authority in any way to revise the statutory formula, even if he should consider it desirable.

the number of their hunting licenses from such an unworthy motive" (Pet. 23a-24a).

Respectfully submitted,

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